THE NAVAJO NATION

JOE SHIRLEY, JR.
PRESIDENT

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VICE-PRESIDENT

August 8, 2003

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Navajo Nation Historic Preservation Department Comments on WT Docket No. 03-128

Dear Ms. Dortch:

The Navajo Nation Historic Preservation Department (HPD) has reviewed the proposed "Nationwide Programmatic Agreement (PA) For Review of Effects On Historic Properties For Certain Undertakings Approved by the Federal Communications Commission." HPD is a Tribal Historic Preservation Office and as such has assumed the functions of the various State Historic Preservation Officers on Navajo Nation lands pursuant to section 101(d)(2) of the National Historic Preservation Act. HPD has participated in the Working Group and has previously provided detailed comments on earlier drafts of the proposed PA and as presently written, the current draft responds to many of HPD's previously expressed concerns.

HPD's comments on the PA follow:

1. The 13th "Whereas" clause states that "the Commission has consulted with Indian tribes regarding this Nationwide Agreement;"... This statement is false and must be removed from the PA. While few tribes have participated in the Working Group, the FCC has not at any time "consulted" with Indian Tribes regarding this PA. The publication of the Notice of Proposed Rulemaking may meet legal requirements to seek public comment, but it does not constitute or substitute for actual consultation with Tribal governments.

   HPD believes that the FCC must undertake a program of active, direct, face-to-face consultations with Tribal governments and NHOs prior to finalizing the PA. HPD believes that such consultations would resolve many of the issues that concern the FCC and the industry.

2. The 16th "Whereas" asserts that the FCC is not delegating its responsibility to consult with Indian Tribes, but the body of the PA is not consistent with this assertion.

3. The 17th "Whereas" asserts that the PA does not "abrogate the rights of Indian tribes or NHOs to consult directly with the Commission regarding the construction of facilities...."

While this statement may be strictly correct, the PA actually flips this FCC responsibility onto the Tribes and makes the Tribes request or demand FCC's involvement. The FCC has an affirmative responsibility to consult with Tribes and NHOs. Absent a Tribal demand for FCC, the FCC leaves all "consultation" up to the applicants and their consultants.

4. HPD finds Stipulation I.D. confusing and potentially subject to substantial misinterpretation. HPD suggests that it be rewritten as

> *"D. This Agreement does not apply on lands within the exterior boundaries of any Indian reservation and all dependent Indian communities (Tribal lands). [NOTE: The National Park Service has determined that for the purposes of section 101(d)(2) of NHPA, Tribal trust lands, beyond the exterior boundaries of an Indian reservation must be regarded as "Tribal Lands" as defined in NHPA. Furthermore, it HPD believes that Tribal fee lands are Tribal lands within the meaning of NHPA.] However, this Nationwide Agreement may apply on Tribal lands should a Tribal government, in accordance with Tribal procedures, provide notice to the Council, Commission, and, as appropriate, the SHPO/THPO that has elected to allow the provisions of this Nationwide Agreement apply on its Tribal lands.*
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> *Where a Tribe has assumed SHPO functions pursuant to Section 101(d)(2) of the NHPA (16 U.S.C. section 470(d)(2)) has elected to permit the application of this Nationwide Agreement on its Tribal lands, the term SHPO/THPO denotes the Tribal Historic Preservation Officer. Where a Tribe has not assumed SHPO functions but has elected to allow the Nationwide Agreement to apply on its Tribal lands, the Tribe must notify the Commission of the designated Tribal official who shall act on behalf of the Tribe for the purposes of this Agreement, and the term SHPO/THPO shall refer to both the designated Tribal representative and the SHPO in such instances. In all other instances the term SHPO/THPO refers to the SHPO."*

5. HPD believes that Stipulation III.A.3 must have time limits. Such structures should not be authorized for periods exceeding 24 months. In addition, it is unclear to HPD, and we suspect to most individuals who are not part of the industry, what is covered by this exclusion. III.A.3 must at a minimum provide a list of the types of broadcast facilities that are being exempted.

6. The dimensions listed in Stipulation III.A.4 appear all wrong. A 10,000 square foot facility is tiny – a square 100 feet on a side. HPD recommends that the minimum size be increased to at least 100,000 square feet (the size of a small Wal-mart), and that

consideration must be given to structures within 400 feet of the boundary of the exempt facility.

7. Stipulations III.A.5.a and b are based on erroneous assumptions about nature of utility interstate Highway right-of-ways (ROW). Power lines are routinely approved even when historic properties are within the ROW so long as the actual siting and construction of towers avoid those historic properties. Typically this involves spanning archaeological sites or modifying construction alignments within the ROW to avoid the properties. As written this exclusion will almost certainly result in damage to significant properties.

   As with III.A.5.a, III.A.5.b is likely to result in damage to historic properties. ROWs for Interstate highways frequently include historic properties that are either partially mitigated or avoided during construction. As currently written, this stipulation would not protect such properties. Furthermore, highway ROWs are routinely realigned to avoid archaeological sites, exempting facilities outside of but within 200 of an existing highway ROW will allow affects to sites that have been avoided during the design and construction of the highway.

8. The industry representatives and the ACHP object to the Navajo Nation's proposed notice requirement for activities exempted under Stipulation III. [III.B.] The industry expresses concern that the Navajo Nation proposal requires the applicant engage in full blown consultation for all these "exempt" activities and that, consequently, nothing is exempted and there is no streamlining. However, HPD proposes only that Tribes be given notice of such activities and given the opportunity to express their concerns (if any). Only if a Tribe expresses such a concern would there be a need to enter into consultation with the Tribe.

   Section 101(d)(6) contains an unequivocal command to Federal agencies to consult with Tribes any time an undertaking may affect a place of traditional religious and cultural significance to the Tribe. Neither the FCC nor the ACHP can use a PA to dilute this statutory requirement. It is true that this requirement is imposed on the FCC and not the applicant, but if the applicant seeks to expedite facilities construction in the name of streamlining by performing some activities required of the FCC by 36 CFR Part 800, the applicant can not object that the FCC shouldn't slow things down by requiring compliance with the plain language of the NHPA. In the interests of "streamlining," HPD's proposal substitutes notice for consultation. Requiring constructive notice is hardly excessive, when the statute requires consultation.

   The ACHP supports the industry by asserting that other Nationwide PAs do not contain such notice requirements. This simply demonstrates that ACHP has been too willing to enter into Programmatic Agreements that are not consistent either with its regulations or the plain language of the NHPA. This startling admission is completely irrelevant to the

present PA. The fact that ACHP has previously executed PAs that violate the law, is no justification for the FCC to propose such an agreement or for ACHP to continue to enter such agreements now or in the future.

9. HPD supports Alternative A, although we believe that it could be made more useful to all parties by being more specific. The Navajo Nation is willing to work directly with applicant/consultants, as long as the FCC is willing to stand by the resulting agreements. At the same time, HPD understands the concerns raised by USET. Many Tribes rightly view such direct consultation with applicant/consultants as a derogation of the government-to-government relationship, which requires FCC to consult directly with the Tribe. Accordingly, it is essential that the FCC preserve the right of Tribes to consult directly with the FCC (rather than with the applicant/consultants).

   HPD believes that the FCC must specify the exact form and content of initial contact letters from the applicant/consultant to the Tribes. The approved format must clearly explain the Tribe's right to demand direct consultation with the FCC rather than the Applicant/consultant. An approved FCC letter format, developed in consultation with Tribal representatives would do much to ensure that the Tribes are properly informed about the undertaking on which they are being consulted, and would insure that the applicant has provided the Tribe(s) with proper notice as well as all in of the information needed to initiate consultation.

10. HPD believes that the it is unwise to categorically determine areas of potential effect of visual impacts. Too many factors contribute to the distance from which a broadcast facility can be seen and visually intrude upon a historic property. The ready availability of visualization software makes such categorical determinations unnecessary.

11. According to footnote 13, PCIA proposes language to limit consideration of visual effects to those towers that are constructed "WITHIN the actual" (emphasis added) boundaries of historic properties, where the visual elements of the properties' setting are important elements contributing to the properties eligibility.

    This stands the entire notion of visual effects on its head. Visual impacts occur where they are seen not merely where the intrusive element in sited. This definition should not be included in the PA.

Sincerely,

Alan Downer
Tribal Historic Preservation Officer